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this Memorandum Decision shall not be  
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PRO SE APPELLANT:

**ROBERT BARNES**  
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

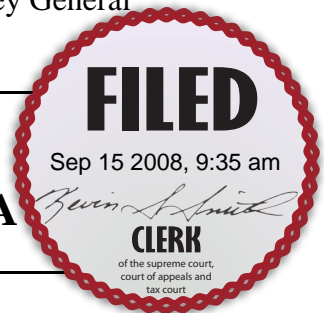
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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT BARNES,

Appellant-Respondent,

vs.

STATE OF INDIANA,

Appellee-Petitioner.

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No. 45A03-0712-PC-603

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Clarence D. Murray, Judge  
The Honorable Kathleen Sullivan, Magistrate  
Cause No. 45G02-0211-MR-00010

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**September 15, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Robert Barnes, *pro se*, appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, he contends that he received ineffective assistance of both trial and appellate counsel. Because Barnes has failed to include the transcript from his underlying trial, we are unable to review one of his ineffective assistance of trial counsel claims and, therefore, he has not met his burden. As to his other ineffective assistance of trial and appellate counsel claims, we affirm.

## **Facts and Procedural History**

The facts underlying this appeal are as follows:

[O]n the night of October 9, 2002, Jerry Stokes, Jesse Green, and Bobby Quinn were at Green's apartment playing video games. At one point in the evening, Stokes witnessed Barnes come to Green's apartment, purchase marijuana, and leave. Approximately ten minutes later, Barnes and another man returned, asking to purchase more marijuana. Once inside the apartment, however, Barnes pulled out a gun and indicated his intent to rob the group. Barnes then shot Green twice, once in the head. After shooting Green, Barnes ordered Quinn and Stokes to lie face down on the floor and empty their pockets. Stokes complied, after which Barnes shot him in the back. Barnes next shot Quinn twice in the back and once in the head. Stokes survived, but Quinn and Green were fatally wounded. Stokes was later able to identify Barnes as the shooter to police.

*Barnes v. State*, No. 45A04-0401-CR-23 (Ind. Ct. App. Jan. 26, 2005).

The State charged Barnes with two counts of murder, one count of Class A felony attempted murder, and one count of Class C felony battery. Barnes' jury trial took place in October 2003. The jury found Barnes guilty as charged, and the trial court sentenced him to an aggregate term of 180 years.

On direct appeal, Barnes challenged his sentence on *Blakely* grounds and argued that his convictions for attempted murder and battery violated double jeopardy. This Court found no *Blakely* violation but did find a double jeopardy violation and therefore vacated his battery conviction.<sup>1</sup> *Id.*

In January 2006, Barnes filed a *pro se* petition for post-conviction relief that he later withdrew. On November 27, 2006, Barnes re-filed his *pro se* petition for post-conviction relief alleging that his trial counsel was ineffective for failing to object to surviving victim Stokes' trial testimony "concerning threats allegedly made to him by a person named Ken Spencer" because the State did not show a connection between Barnes and Spencer. Appellant's App. p. 55-56. Barnes also alleged that his trial counsel was ineffective for failing "to subpoena two available witnesses (Dia Nelson and Everitt Mohn) who could have corroborated [his] testimony." *Id.* at 56. Finally, Barnes alleged that his appellate counsel was ineffective for failing to argue on appeal ineffective assistance of trial counsel based on these claims.

A post-conviction hearing was held in March 2007. At the hearing, trial counsel testified that he did not recall Stokes' testimony about Spencer's threatening phone call. Concerning Barnes' alibi defense, trial counsel testified that Barnes had supplied him with the names of his potential alibi witnesses but that he was unable to locate one of them. Trial counsel spoke with the other person but determined that the other person's testimony did not establish an alibi defense because it allowed for a window of time for Barnes to commit the offenses. Everett Mohn, one of the potential alibi witnesses

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<sup>1</sup> Because Barnes' battery and attempted murder sentences ran concurrently, there was no effect upon his aggregate sentence.

identified in Barnes' petition for post-conviction relief, testified that he was with Barnes on the night of the offenses but that Barnes left at some unspecified time for an unspecified period. Appellate counsel testified that he did not raise the issue of Stokes' testimony about Spencer's threatening phone call because there was no objection and because he did not believe it rose to the level of fundamental error. Appellate counsel also testified that he did not raise the issue of the alibi witnesses because an evidentiary hearing was needed to develop their testimony. That is, appellate counsel made the tactical decision not to raise any ineffective assistance of counsel claims on direct appeal so that these claims would not be foreclosed on post-conviction review, where there is an opportunity for an evidentiary hearing.

On November 15, 2007, the post-conviction court issued Findings of Fact and Conclusions of Law denying relief. The relevant conclusions provide:

8. Regarding the petitioner's claim that trial counsel failed to subpoena the defendant's purported alibi witnesses, trial counsel testified that he attempted to contact both alibi witnesses prior to trial. Counsel stated that he could not locate one of the witnesses and that the other witnesses' testimony as to the petitioner's whereabouts the night of the murders did not qualify as an alibi.

9. The petitioner has also challenged the effectiveness of counsel for failing to object to testimony that a witness had been threatened without a showing that the threats were connected in some manner to the defendant. However, the petitioner has failed to cite to the pages in the record of proceedings that contain that testimony. The petitioner's failure to cite to specific pages in the record amounts to a waiver of this issue. *Wentz v. State*, 766 N.E.2d 351, 363 (Ind. 2002).

10. The Record of Proceedings reveals that the living victim knew the petitioner, and identified him as the shooter. Trial counsel's decision not to call a witness that could not account for the petitioner's whereabouts at the time of the murders was strategic, and did not prejudice the petitioner. Petitioner's trial counsel did not render ineffective assistance.

11. Similarly, petitioner's appellate counsel did not render ineffective assistance. Appellate counsel's decision not to raise an ineffective assistance counsel claim on direct appeal was strategic. Though appellate counsel did not find a basis for such a claim in his review of the record, in choosing not to raise it on direct appeal, the issue was preserved for review in a petition for post-conviction relief and thus, it cannot be said to have prejudiced the petitioner.

12. The petitioner was not denied effective representation.

Appellant's App. p. 20-21. Barnes, *pro se*, now appeals.

### **Discussion and Decision**

Barnes contends that the post-conviction court erred in denying his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. *Henley v. State*, 881 N.E.2d 639, 643 (Ind. 2008). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Id.* To prevail on appeal from the denial of post-conviction relief, a petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id.* at 643-44. Further, the post-conviction court in this case made findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). Although we do not defer to the post-conviction court's legal conclusions, "[a] post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.'" *Id.* (quoting *Ben-Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000), *reh'g denied*).

On appeal, Barnes alleges both trial and appellate counsel ineffectiveness. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh’g denied*. A claimant must demonstrate that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. “Prejudice occurs when the defendant demonstrates that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

### **I. Trial Counsel**

Barnes first argues that his trial counsel was ineffective for failing to object to Stokes’ trial testimony concerning the threatening telephone call he received from a person named Ken Spencer shortly after Barnes was arrested because the State did not connect the threat to Barnes. In addressing this issue on appeal, both Barnes and the State cite to and quote from portions of the trial transcript where Stokes testified. However, the trial transcript is not included in the record on appeal.<sup>2</sup> The State explains:

Barnes did not produce any evidence, in the form of citations to the trial transcript or otherwise, in his PCR [petition], at his PCR hearing, or in his Proposed Findings of [Fact] and Conclusions of [Law] as to the precise

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<sup>2</sup> Barnes does include three pages from the trial transcript in his appendix, specifically, trial transcript pages 169-171. *See* Appellant’s App. p. 64-66. This is a portion of Stokes’ re-direct examination. However, Barnes and the State cite to other pages from the trial transcript on appeal. Because Barnes only includes a portion of the trial transcript in his appendix, it is not helpful to us on appeal.

nature of Stokes' testimony. *[Barnes] did not submit his trial transcript into evidence at his PCR hearing . . . .*

Appellee's Br. p. 9 (emphasis added) (citations omitted). Inexplicably, however, the parties were able to cite to and quote from the trial transcript in their briefs. The post-conviction court's Finding No. 10 provides:

A hearing on the petition for post-conviction relief was held on March 8, 2007, at which the court requested that the Record of Proceedings be obtained from the appellate court for use in ruling on the instant petition and the court also took judicial notice of its file in this cause and the related trial file under cause number 45G02-0211-MR-00010.

Appellant's App. p. 18. If the post-conviction court eventually obtained the trial transcript, which is not the post-conviction court's job, it was not made part of the record in this case. And, as quoted above, the post-conviction court ultimately concluded that Barnes waived this issue for failing to cite to the portions of the trial transcript containing Stokes' testimony.

More fundamentally, we are presented with no means by which we can evaluate the error and prejudice allegedly suffered by Barnes because we have not been provided with a transcript of the trial. *See Taylor v. State*, 882 N.E.2d 777, 782 (Ind. Ct. App. 2008). And we simply cannot rely on Barnes' and the State's version of what happened at trial.

As our Supreme Court has previously observed, "[i]t is practically impossible to gauge the performance of trial counsel without the trial record. . . ." *Tapia v. State*, 753 N.E.2d 581, 588 n.10 (Ind. 2001); *see also Bahm v. State*, 789 N.E.2d 50, 61 (Ind. Ct. App. 2003), *clarified on reh'g on other grounds*, 794 N.E.2d 444 (Ind. Ct. App. 2003), *trans. denied*.

*Id.* Though it is unclear whether the trial transcript was actually before the post-conviction court, the law is clear that, as a general rule, a post-conviction court may not

take judicial notice of the trial transcript. *Bonds v. State*, 729 N.E.2d 1002, 1006 (Ind. 2000), *reh'g denied*. Whether a defendant received ineffective assistance of counsel is a highly fact-sensitive determination. Lacking a record with which we can evaluate Barnes' claim, we cannot say that he has met his burden of proving that he was subjected to error and prejudiced by his trial counsel's alleged failure to object to Stokes' testimony. Barnes therefore has failed to prove that he received ineffective assistance of trial counsel.

Barnes next argues that his trial counsel was ineffective for failing to produce two alibi witnesses, Dia Nelson and Everett Mohn, at trial. The evidence before the post-conviction court was that, before trial, Barnes' trial counsel attempted to contact both Nelson and Mohn. Mohn testified at the post-conviction hearing that Barnes' trial counsel had attempted to contact him before trial but that he had some medical issues at the time and did not respond. However, Mohn testified that he was in court on the first day of Barnes' trial but did not speak with trial counsel. Mohn further testified that he had been with Barnes on the night of the offenses but that Barnes left at some unspecified time for some unspecified period. Thus, Mohn could not account for Barnes' whereabouts sufficiently to provide a valid alibi. As for Nelson, the post-conviction court made the following finding:

13. Dia Nelson was subpoenaed by the petitioner, however, Nelson failed to appear at the post-conviction relief hearing and a warrant was issued by the court for his arrest. As of today's ruling, Nelson has not been located and warrants for his arrest are outstanding not only in this cause number but also 45G02-0707-MR-00007 and 45G02-0403-FC-00033.



Appellant's App. p. 19. Thus, the evidence establishes that neither proposed alibi witness would have provided a valid alibi for Barnes. The post-conviction court concluded that trial counsel's decision not to call these witnesses was strategic and did not prejudice Barnes. In light of the evidence presented at the post-conviction hearing, Barnes has failed to show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court.

## **II. Appellate Counsel**

Barnes contends that appellate counsel was ineffective for failing to argue on direct appeal that he received ineffective assistance of trial counsel based on these claims. Where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [the] argument[s] on appeal." *Davis v. State*, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), *trans. denied*. Barnes' ineffective assistance of appellate counsel claim thus fails.

The judgment of the post-conviction court is affirmed.

KIRSCH, J., and CRONE, J., concur.